PD-0445-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/12/2019 12:43 PM
Accepted 4/12/2019 1:10 PM
DEANA WILLIAMSON
CLERK

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/12/2019
DEANA WILLIAMSON, CLERK

JOHNNIE DUNNING,
APPELLANT

V. PD-0445-18
COA NO. 02-17-00166-CR
TRIAL COURT NO. 0632435D

THE STATE OF TEXAS,
APPELLEE

APPEALED FROM CAUSE NUMBER 0632435D, IN THE 371ST DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE MOLLEE WESTFALL, JUDGE PRESIDING.

# APPELLANT'S MOTION FOR REHEARING

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*** ORAL ARGUMENT NOT REQUESTED***

TO THE PRESIDING JUDGE AND JUDGES OF
THE COURT OF CRIMINAL APPEALS:

COMES NOW, Appellant, Johnnie Dunning, and files this Motion for Rehearing of the Court's decision in this case, and would show the Court the following:

1. This Court handed down its decision in this case on April 3, 2019. ***Texas Rule of Appellate Procedure 79.1*** requires that a motion for rehearing be filed within 15 days of the date of judgment. This motion for rehearing is timely filed.

2. This Court, in a unanimous, published decision authored by Judge Hervey, held that the Court of Appeals erred because it gave too much weight to the test results excluding Appellant and too little weight to the inculpatory evidence. Opinion, at pages 9-10.

3. Appellant would submit to this Court that its opinion is incorrect or otherwise improperly relied on incorrect evidence, as set out herein. The Court initially bases its decision on the fact that Dr. Bruce Budowle and presumably the trial court had determined that touch DNA was of a low probative value, and the Court of Appeals had placed too much reliance to the presence of the third party DNA found in the crotch area, and had to disbelieve Budowle's testimony.

To the contrary, Appellant would submit that the most compelling testimony in the entire hearing, which should be the controlling evidence, is the testimony of Dr.

Budowle, and is as follows:

> Q. But the fact of the matter is you don't have any dispute that this little boy's underwear has both his DNA on it and got somebody else's DNA on it, right?
> A. I don't dispute that, no.
> Q. And that somebody else's DNA is not Johnnie Dunning's?
> A. I don't dispute that no.

[February 28, 2017 hearing] RR-2, Page 99, Lines 13-22.[1]

The above testimony should be the controlling evidence in this case. Appellant submits that the inclusion of an unknown person's DNA in the victim's clothing is extremely probative towards showing a 51% chance of an acquittal had this evidence been presented at a trial. If Dr. Budowle had testified at a trial and stated the above testimony, Appellant submits that would have been the case. The key point here is that there is an additional person's DNA is present with no reason to be there, not merely that Appellant's DNA is not there. It was therefore an incorrect decision by this Court by not deciding the case in Appellant's favor.

Additionally, the opinion misquoted a fact concerning Dr. Budowle's opinion of transfer of touch DNA by holding two days was implicitly a problem with contamination contrary to evidence that showed a good chain of custody. It is actually about half a day, as discussed below. Finally, the victim's initial description was of

[1]This transcription was initially incorrectly transcribed. In January of 2019, after submission, this mistake was corrected, and the correct testimony was included in an Amended Record. The corrected record (Volume 2) was filed with this Court on January 11, 2019.

a man with a beard, when the record shows no beard, and these two facts, wrongly relied on in this Court's opinion as strictly inculpatory and not exculpatory, should have made the difference here.

The opinion, at page 4, notes that the victim was still wearing the shorts when he went to the hospital but incorrectly states it was ***TWO DAYS*** after the assault, and then correctly states that police report showed that the victim had not bathed or washed his genitals after the result. Appellant would agree that the theory of DNA contact evidence testified to by Dr. Budowle is generally correct. However, the contact theory problems Budowle described was negated due to the victim taking precautions as instructed by the police to get to the sexual assault exam as soon as possible and not bathing or otherwise contaminating the evidence.

The victim's actions were immediate and not two days later as stated in this Court's opinion. There was less time for contamination and there is no evidence that there was any contamination at all. Defense Exhibit 7 (sealed), indicates the victim arrived at the hospital at 9:40 a.m., on September 3, 1996, (report was faxed the next day, September 4, 1996), roughly 15 hours after the assault took place, as indicated on pages 4, and 38-41 of Defendant's Exhibit 9 (sealed). Page 4, entitled "Fort Worth Police Department Crime Lab Evidence Report" indicates Date of Offense 9-3-1996, and the evidence was collected by the police on "9-3-96 Tue. at 11:40 hours" (Note:

September 3, 1996 was a Tuesday). The original police report indicates that the offense occurred on Monday, September 2, 1996 "just before dark". Defendant's Exhibit 9, Pages 38-41 (sealed), and reported to the police at 2230 hours "ON MONDAY 090296 AT APPROX 2230 HRS", and occurred "JUST BEFORE DARK" Defendant's Exhibit 9, Page 41 (sealed). This evidence was incorrectly stated, and should have weighed in Appellant's favor and not against him. The police report does indicate that the sexual assault exam was a day later (two days) in other places, however, the sexual assault exam indicates in the time stamp for admission that the victim was at the hospital on September 3, 1996. It was faxed to the police the next day, September 4, 1996, Defendant's Exhibit 7, page 1 (cover page)(sealed), which makes more sense, given that the actual time of exam is 19:40 hours on September 3, 1996, and arrival was 9:40 a.m.

***Thus, the victim went to the hospital the next day, about 15 hours after the assault, not two days later, and this evidence should have weighed in Appellant's favor and not against him***.

The second factual matter, that is, that the victim described a big black man with a beard and a mustache is factually correct, but Appellant had no facial hair. The original description of the perpetrator is of a black male. Appellant and Allen Beavers are both black. What is not in that reporter's record of the trial court, but is in the

police report (Def. Ex 9) (sealed), pages 39-45, is that the initial description is that the assailant had ***facial hair*** as well.

The victim's description included a description of a "big black man with a beard and mustache". Allen Beavers is listed as having a goatee and mustache, Appellant has no facial hair. This person was pointed out by the victim to James Oliver (W3), who in turn provided that description to the police as a black male, 5'11", 220 pounds, goatee and mustache, wearing beige slacks, blue and white stripe shirt and a ball cap. Janetta and Lorne Clark, the victim's parents recognized this initial, first description as that of Allen Beavers, who lived in the apartment complex. Def. Ex 9, Page 41 (pages unnumbered). While the victim ultimately identified Appellant, his initial identification was someone else. Appellant submits that conflicting identifications should not be used as strictly inculpatory matters for ***Art. 64, C.C.P.*** matters. If so, then the letter from Lorne Clark, (Motion for New Trial Hearing, Def. Ex. 1) to then Judge James Wilson of the 371st District Court (Judge Westfall's predecessor) that states that Clark had never seen Appellant before should be reviewed for purposes of this appeal.

There are other inconsistencies, but those inconsistencies, including the ones set out above, are better suited for a writ hearing, or a trial. The sole issue is the 51% probability, and Dr. Budowle's testimony should be the only matter considered in an

***Art. 64, C.C.P***. inquiry, However, if the ones that inculpate Appellant are considered in this appeal, Appellant submits the exculpatory ones should also be considered.

Additionally, Appellant submits that this Court gave improper consideration to the fact that Appellant originally pled guilty. ***Art 64.03 (b) C.C.P.*** states that a convicting court is prohibited from finding that identity was not an issue in the case ***solely on the basis of that plea, confession, or admission, as applicable.*** Appellant's guilty plea should not have been considered at all for purposes of relevance and inculpatory evidence, and yet the State has argued, and this Court considered and discussed Appellant's guilty plea extensively in its opinion as inculpatory evidence in denying relief.

Appellant was precluded from showing relevance in the matters presented in the original DNA hearing, and in the subsequent hearing the trial judge also refused to allow any testimony on relevance matters. The hearing was held in theory to determine what and where any DNA might found, and then Appellant was denied any opportunity to show why the results mattered and then the State on appeal has consistently been able to argue the findings were not relevant. If relevance to the location of the DNA on the shorts had been allowed and had been considered, Appellant submits he would have been granted relief.

It has been nine years since Appellant filed his original application for Post

Conviction DNA testing. His request was sent more than once but lost or somehow unavailable for four years, he was denied counsel, and when a hearing finally occurred, Appellant was prohibited from showing the relevance of findings in his favor, and then the lack of proof of relevance has been used to deny a favorable ruling that only requires a preponderance of evidence in his favor.

Appellant appreciates this Court's diligence in resolving this case. Specifically, this Court requested evidence not normally provided (sealed items), allowed a supplementation of an erroneous record, and the staff at the Court was at all times pleasant and attentive to counsel's inquiries. This Court issued a 22 page opinion, which appears to be well thought out. However, Appellant would submit to the Court that the reliance on a fact that is not correct (two days vs. one day before the victim went to the hospital), the initial identification of another person, and a holding that a guilty plea that statutorily should not have been argued by the State or considered by this Court, and precluded him from a favorable outcome.

Appellant requests that this Court withdraw its opinion and substitute an opinion that grants relief to Appellant.

Appellant thanks the Court for its time.

## PRAYER

Appellant respectfully requests that this Court reconsider its ruling of April 3, 2019, reevaluate the facts and issue an opinion holding that Appellant is entitled to a favorable finding for DNA purposes.

RESPECTFULLY SUBMITTED,

/S/ WILLIAM H. "BILL" RAY
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## CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's Motion for Rehearing was provided to the office of Sharen Wilson, Criminal District Attorney, at the Office of the Criminal District Attorney of Tarrant County, Texas, 401 W. Belknap St. Ft. Worth, Tx. 76196-0201, and the State Prosecuting Attorney, on the date of this document's filing via electronic delivery.

/S/ WILLIAM H. "BILL" RAY
WILLIAM H. "BILL" RAY

## CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Rule 9.4 (e), of the Texas Rules of Appellate Procedure because it has been prepared in a conventional typeface no smaller than 14 point for text and 12 point for footnotes. It complies with the word count limitations of Rule 9.4 (I) because it contains 2031 words, excluding any part exempted by Rule 9.4 (i)(1), as computed by WordPerfect, the computer software program used to prepare this document.

/S/ WILLIAM H. "BILL" RAY
WILLIAM H. "BILL" RAY